Filed 2/23/05 State of Cal. Employment Development Dept. v. WCAB CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STATE OF CALIFORNIA, EMPLOYMENT DEVELOPMENT DEPARTMENT Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA et al., Respondents.	No. B177453 (W.C.A.B. No. VNO 399958 VNO 399959)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled in part, affirmed in part and remanded with directions.

Robert W. Daneri, Suzanne Ah-Tye, and Don E. Clark for petitioner.

Sparagna, Sparagna & Cadman, and Francis A. Sparagna for respondent, Kathryn Kral.

Ernest A. Canning, amicus curiae, for respondent, Kathryn Kral.

No appearance for respondent, Workers' Compensation Appeals Board.

INTRODUCTION

Petitioner, Employment Development Department of the State of California, employed respondent, Kathryn Kral, who alleged industrial injuries and was awarded workers' compensation by respondent, Workers' Compensation Appeals Board (WCAB). Petitioner contends that the WCAB failed to apply Senate Bill (S.B.) 899 and new Labor Code section 4663, which was enacted after trial and before the WCAB's decision.

We conclude, consistent with our opinion in *Kleemann v. Workers' Comp. Appeals Board* (2005) ___ Cal.App.4th ___ (*Kleemann*) that the Legislature intended new Labor Code sections 4663 and 4664 to apply to pending cases such as petitioner's prospectively from the date of enactment of S.B. 899, regardless of the date of injury. Accordingly, the decision of the WCAB is annulled, in part, and the matter is remanded to apply apportionment under new Labor Code sections 4663 and 4664.

FACTUAL AND PROCEDURAL BACKGROUND

Kathryn Kral, an employment program specialist for the Employment Development Department of the State of California (State), claimed orthopedic, psychiatric and internal injuries including diabetes due to work from March 22, 1992 to November 23, 1999.

Kral obtained medical-legal reports from physicians of various specialties, including internist Darrell Burstein, M.D. Dr. Burstein reported that Kral had adult onset diabetes mellitus, which had been aggravated and accelerated by stress at work, cortisone injections for industrial orthopedic injuries, and pain from industrial carpal tunnel syndrome and a right shoulder injury. Dr. Burstein concluded that Kral should avoid work with undue stress, without apportionment to nonindustrial factors.

The State obtained a medical-legal report from internist Prakish Jay, M.D. Dr. Jay concluded that Kral's diabetes mellitus was not caused or aggravated by work, in light of the fact that she had been taking medication for her diabetes since January of 1997.

The parties submitted the matter to the workers' compensation administrative law judge (WCJ) without testimony. On August 12, 2002, the WCJ issued a findings and award, finding industrial injury to the hands, elbows and internal system including diabetes, and awarding 58 percent permanent disability without apportionment.

The State petitioned the WCAB for reconsideration, and alleged that Dr. Burstein's opinion was not substantial evidence. (Petn., exh. 2.) In the report on reconsideration, the WCJ explained that Kral's diabetes was diagnosed following four years of work with the State and the carpal tunnel injuries, which was addressed by Dr. Burstein but not Dr. Jay. On October 17, 2002, the WCAB granted reconsideration, finding the opinions of both Drs. Burstein and Jay deficient in explaining causation of Kral's diabetes. The WCAB remanded the matter for further development of the medical record.

Dr. Burstein issued a supplemental report and explained that trauma such as carpal tunnel syndrome leads to alteration in carbohydrate metabolism, which includes glucose utilization, production and intolerance, and insulin resistance. The cortisone injections for carpal tunnel syndrome in 1996 also had anti-insulin effects. In addition, emotional and physical stress and pain produce similar adverse responses, such as redirection by the brain of energy needed for healing or production of anti-insulin chemicals.

Dr. Burstein was also deposed and did not change his opinion regarding apportionment. However, Dr. Burstein conceded Kral weighed 260 pounds and was 69 inches tall, and that her diabetes was caused by a combination of factors including weight and some inherited factors.

The State obtained a supplemental report from Dr. Jay, who indicated Kral had Type II diabetes mellitus which is not caused by stress. Dr. Jay reasoned that, although severe stress can aggravate diabetes mellitus, Kral had improved since first being diagnosed in 1996. Dr. Jay concluded that exogenous obesity was probably the cause of her disease.

The matter was resubmitted to the WCJ without testimony.

On April 19, 2004, the WCJ issued a findings and award, finding industrial injury to the hands, elbows, psyche and internal system including diabetes, and awarding 81 percent permanent disability. In regards to apportionment, the WCJ stated that, "There being no persuasive evidence supporting apportionment in accordance with correct principles, applicant is entitled to an unapportioned award."

The State petitioned the WCAB for reconsideration. The State contended that Dr. Burstein's opinion was not substantial evidence for various reasons, including the failure to apportion to obesity and other nonindustrial factors under S.B. 899[1] and new Labor Code section 4663.[2]

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[1] S.B. 899 was enacted on April 19, 2004.

[2] Section 33 of S.B. 899 states: "Section 4663 of the Labor Code is repealed."

Section 34 of S.B. 899 states: "Section 4663 is added to the Labor Code, to read: [¶] 4663. (a) Apportionment of permanent disability shall be based on causation. [¶] (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability. [¶] (c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination. [¶] (d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments."

Section 35 of S.B. 899 states in relevant part: "Section 4664 is added to the Labor Code, to read: [¶] 4664. (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment. [¶] (b) If the applicant has received a prior award of permanent

In the report on reconsideration, the WCJ responded that Dr. Burstein's supplemental report explained in detail how Kral's diabetes developed from employment and why there is no apportionment. In contrast, the WCJ pointed out that Dr. Jay ignored development of the diabetes after Kral received cortisone injections on an industrial basis. On July 12, 2004, the WCAB adopted the WCJ's report and denied reconsideration.

The State petitions for writ of review and contends that Section 47[3] required the WCAB to apply new and not former section 4663.[4] The State argues that workers' compensation rights are wholly statutory and not vested pursuant to contract or common law, and end while a case is pending with repeal or amendment, absent a savings clause,

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disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof."

All further statutory references are to the Labor Code unless otherwise stated.

[3] Section 47 of S.B. 899 states: "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

[4] Former section 4663 provided: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributable to the injury."

Formerly, apportionment was to disability and not to pathology or causation. (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238, 242 (*Franklin*).) Disability from "lighting up", aggravating or accelerating a preexisting non-disabling disease process may have been compensable without apportionment. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (1980) 26 Cal.3d 450, 454 (*Pullman Kellogg*); *Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798; *Franklin, supra,* 79 Cal.App.3d at pp. 237-238, 242.)

under *Graczyk v. Workers' Comp. Appeals Board* (1986) 184 Cal.App.3d 997 (*Graczyk*).[5] The state also contends that the WCAB violated section 5908.5,[6] by failing to address S.B. 899 and new section 4663 in denying reconsideration.

Kral answers that the State's position requires impermissible retroactive application of S.B. 899. Kral further contends that retroactive application must be clearly intended by the Legislature under *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 392 (*Aetna Casualty*),[7] but that here the statutory language establishes that the Legislature intended prospective application. Finally, Kral asserts that retroactive

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[5] In *Graczyk*, the court of appeal ruled that an amendment to section 3352, which excluded student athletes as employees, applied retroactively to the prior date of injury. The court noted that workers' compensation is wholly statutory, and substitutes a new system of rights and obligations in place of the common law. (*Graczyk, supra,* 184 Cal.App.3d at pp. 1002-1003.) Where a right depends on statute and does not exist under common law, repeal of the statute destroys the right unless reduced to final judgment or the statute has a savings clause. (*Id.* at pp. 1006-1007.) The repeal of a statutory right is justified because statutory remedies are pursued with the realization that the Legislature may abolish the right to recovery at any time. (*Id.* at p. 1007.) Although the law in force at the time of injury is usually determinative in workers' compensation, a statutory change may be applied retroactively if clearly intended by Legislature. (*Id.* at pp. 1007-1008.)

[6] Section 5908.5 states in relevant part: "Any decision of the appeals board granting or denying a petition for reconsideration or affirming, rescinding, altering, or amending the original findings, order, decision, or award following reconsideration shall be made by the appeals board and not by a workers' compensation judge and shall be in writing, signed by a majority of the appeals board members assigned thereto, and shall state the evidence relied upon and specify in detail the reasons for the decision."

[7] In *Aetna Casualty*, the Supreme Court ruled that, because the law in force on the date of injury normally determines the right of recovery in workers' compensation, a Labor Code amendment after the date of injury that increases compensation is substantive, and should be applied prospectively, not retroactively. (*Aetna Casualty, supra,* 30 Cal.2d at pp. 392-395.) Such statutes are not given retrospective operation without clear indication the Legislature so intended. (*Id.* at p. 393.) In contrast, statutes that effect procedural changes will be applied to pending cases, but application is considered prospective where the analysis looks at the legal requirements at the date of the proceedings. (*Id.* at p. 394.)

application of new section 4663 would result in delays and costs contrary to the goals of S.B. 899 and the workers' compensation system.

DISCUSSION

I. Standards of Review

This case requires us to determine the meaning and effect of the statutory provisions at issue. The Legislature's intent should be determined and given effect.[8] We interpret governing statutes or application of the law to the facts de novo, and the WCAB's construction is entitled to great weight unless clearly erroneous.[9]

We will affirm factual findings supported by substantial evidence.[10] However, we are not bound to accept factual findings that are erroneous, unreasonable, illogical, improbable, or inequitable when viewed in light of the entire record and the overall statutory scheme.[11]

In construing these provisions, we look first to the plain or ordinary meaning of the statutory language, unless the language or intent is uncertain.[12] Every word and clause is given effect so that no part or provision is useless, deprived of meaning or

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[8] *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 (*Dubois*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 (*Moyer*).

[9] *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 515-516; *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828.

[10] *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 (*Western Growers*).

[11] *Western Growers, supra,* 16 Cal.App.4th at page 233; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254.

[12] *DuBois, supra,* 5 Cal.4th at pp. 387-388; *Moyer, supra,* 10 Cal.3d at p. 230.

contradictory.[13] We interpret statutory language in light of the purpose of the statute and the statutory framework as a whole,[14] using rules of construction or legislative history and practice to aid in determining legislative intent where statutory language or the Legislature's intent is uncertain.[15]

When new legislation repeals existing law, statutory rights normally end with repeal unless the rights are vested pursuant to contract or common law.[16] In a case such as this, where workers' compensation rights which are purely statutory and not based on

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[13] *DuBois, supra,* 5 Cal.4th at p. 388; *Moyer, supra,* 10 Cal.3d at p. 230.

[14] *DuBois, supra,* 5 Cal.4th at p. 388; *Moyer, supra,* 10 Cal.3d at p. 230.

[15] *DuBois, supra,* 5 Cal.4th at pp. 387-388, 393.

[16] *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 (*Governing Board*) (authority to dismiss a teacher for marijuana possession under Education Code ended by implied repeal of Health and Safety Code enactment during appeal); *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12 (*Southern Service*) (law allowing taxpayer refunds, repealed during appeal, ended rights under the statute); *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 75-81 (judgment final after appeal despite subsequent repeal of statute and appeal of denial of motion for new trial).

common law are at issue,[17] repeal ends the right[18] absent a savings clause.[19] Rights end during litigation if repeal occurs before final judgment.[20]

II. Procedural and Substantive Changes Under New Sections 4663 and 4664

A. *Procedural Changes*

Kral contends that the Legislature intended prospective application of all of the changes under new section 4663, because the plain language in new section 4663, subsection (b) addresses medical reports that are prepared after enactment of S.B. 899. Kral's reasoning is flawed. New section 4663, subsections (b) and (c) specify requirements for reporting apportionment by physicians, which are procedural and not substantive changes of existing rights, liability or compensation.[21] Procedural changes under these subsections apply prospectively to future medical reports, because the procedure becomes applicable in cases pending after enactment of S.B. 899.[22]

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[17] *Graczyk, supra,* 184 Cal.App.3d at pp. 1003, 1006.

[18] *Southern Service, supra,* 15 Cal.2d at pp. 11-12; *People v. Bank of San Luis Obispo, supra,* 159 Cal. at p. 67; *Graczyk, supra,* 184 Cal.App.3d at pp. 1006-1007. See also *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489 (*Beckman*).

[19] Section 4 of the Labor Code is a savings clause. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206-1208 (*Evangelatos*) (Proposition 51 is prospective unless clear legislative intent retroactive).)

Section 4 of the Labor Code states: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."

[20] *Governing Board, supra,* 18 Cal.3d at pp. 829, 831; *People v. Bank of San Luis Obispo, supra,* 159 Cal. at pp. 77, 79-80; *Beckman, supra,* 4 Cal.App.4th at pp. 488-489.

[21] *Aetna Casualty, supra,* 30 Cal.2d at pp. 392-395; *Graczyk, supra,* 184 Cal.App.3d at pp. 1006-1007.

[22] *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287-289 (*Tapia*) (procedural part of Proposition 115 may be applied prospectively to trial for crime committed before

Kral also argues that the Legislature intended prospective application of new section 4663, because new section 4660, subdivision (d)[23] applies the new permanent disability rating schedule to future and not existing medical reports, and both statutes address permanent disability under "Disability Payments" of Article 3, Chapter 2 of Division 4 of the Labor Code. Although new sections 4660 and 4658 instruct which permanent disability rating schedule applies according to the date of injury and existence of certain medical reports, we disagree with Kral's logic. The Legislature provided

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measure was approved); *Aetna Casualty, supra,* 30 Cal.2d at p. 394; *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 917-918 (*Pebworth*) (Labor Code amendment after date of injury allowing settlement of vocational rehabilitation applicable prospectively as a procedural change in calculating liability; no new or additional liability or substantial affect on existing rights and obligations); *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 1028, 1031-1032 (*Industrial Indemnity*) (amendment repealing voluntary vocational rehabilitation and requiring employer to provide benefit ruled substantive and not retroactive to date of injury before amendment).

[23] New section 4660, subsection (d) states: "The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on or after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

See also new section 4658, subsection (d)(4) which states: "For compensable claims arising before April 30, 2004, the schedule provided in this subdivision shall not apply to the determination of permanent disabilities when there has been either a comprehensive medical-legal report or a report by a treating physician, indicating the existence of permanent disability, or when the employer is required to provide the notice required by Section 4061 to the injured worker."

certain conditions for prospective application of statutory changes when it chose to do so, but such provisions are not contained in new sections 4663 and 4664.[24]

B. *Substantive Changes*

New legislation may consist of substantive as well as procedural changes.[25] New sections 4663, subsection (a) and 4664 provide that apportionment is based on causation rather than disability. We agree with the parties that such change is substantive, since liability for compensation could be lessened or even eliminated, for example where a percentage of permanent disability is caused by a prior non-disabling disease process.[26] However, for the reasons set forth in *Kleemann*, we conclude that new sections 4663 and 4664 apply in this case.

C. *The Law In Effect Should Be Applied*

Rights end with a statute's repeal during litigation and the court is obligated to apply the laws in effect, even during appeal.[27] As former section 4663 was repealed and new sections 4663 and 4664 became effective under S.B. 899 before reconsideration was decided, the WCAB was required to apply the new legislation. Apportionment to causation needed to be addressed, as both physicians indicated Kral's diabetes mellitus may have been caused by a combination of factors including weight and genetic disposition.

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[24] *DuBois, supra,* 5 Cal.4th at p. 388; *Moyer, supra,* 10 Cal.3d at p. 230.

[25] *Tapia, supra,* 53 Cal.3d at pages 287-289.

[26] See footnote 4, *ante*.

[27] *Governing Board, supra,* 18 Cal.3d at pp. 828-831; *People v. Bank of San Luis Obispo, supra,* 159 Cal. at pp. 79-80; *Beckman, supra,* 4 Cal.App.4th at p. 489; *Graczyk, supra,* 184 Cal.App.3d at pp. 1006-1007.

III. Section 5908.5 Was Violated

The State also contends that the WCAB's failure on reconsideration to address S.B. 899 and apportionment under new sections 4663 and 4664 violated section 5908.5. We agree.

The WCAB is obligated to address issues that are raised and may be deteminative so that meaningful review can be achieved.[28]

DISPOSITION

The decision of the WCAB is annulled, in part, in order to apply apportionment under S.B. 899 and new sections 4663 and 4664. The decision is otherwise affirmed. The matter is remanded for further proceedings consistent with this decision.

ZELON, J.

We Concur:

JOHNSON, Acting P.J.

WOODS, J.

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[28] See *Painter v. Workers' Comp. Appeals Bd.* (1985) 166 Cal.App.3d 264, 268, 270-271; *Burbank Studios v. Workers' Comp. Appeals Bd.* (1982) 134 Cal.App.3d 929, 936.